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No. 95-1007

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

WASHINGTON SUBURBAN SANITARY COMMISSION,
Petitioner,

v.

WESTFARM ASSOCIATES LIMITED PARTNERSHIP, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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RESPONDENT WESTFARM'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. After a toxic chemical is put into a sewer, does a subsequent leak of the chemical out of the sewer, caused by the sewer owner's negligence, constitute a "release" under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")?

2. Does CERCLA render a sewer owner liable for toxic waste contamination resulting from the owner's negligence?

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, Respondent Westfarm Associates Limited Partnership states that it is not a corporation, and has no parent company or nonwholly owned subsidiaries.

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RESPONDENT WESTFARM'S BRIEF IN OPPOSITION

STATUTES INVOLVED

The CERCLA definitions of "environment" (42 U.S.C. § 9601(8)); "facility" (42 U.S.C. § 9601(9)); and "release" (42 U.S.C. § 9601(22)), as well as the liability provision for an "owner" or "operator" of a "facility" (42 U.S.C. § 9607(a)), are set out at pp. 2-5 of the Petition.

The term "person" is defined by CERCLA (42 U.S.C. § 9601(21)) to mean:

> an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body.

Section 9601(20)(D), 42 U.S.C. § 9601(20)(D) further provides:

> The term "owner or operator" does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph shall not apply to any State or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such a State or local government shall be subject to the provisions of this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title.

CERCLA's "innocent landowner" affirmative defense appears at 42 U.S.C. § 9607(b)(3), which states in relevant part:

> There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—
>
> * * * *
>
> (3) an act or omission of a third party * * * if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions * * *.

Finally, 42 U.S.C. § 9613(f)(1) provides in relevant part:

> Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. * * * In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. * * *

COUNTERSTATEMENT OF THE CASE

INTRODUCTION

Petitioner Washington Suburban Sanitary Commission ("WSSC") operates a sewer system. (Pet. 2a.)[1] WSSC's sewer line runs adjacent to property owned by Respondent Westfarm Associates Limited Partnership ("Westfarm"), and serves a research laboratory operated by Westfarm's neighbor, Respondent International Fabricare Institute ("IFI"). (*Id.* at 2a-4a.) IFI poured toxic chemicals down a laboratory drain which subsequently leaked out of WSSC's sewer and contaminated Westfarm's land. (*Id.* at 3a-4a.)

WSSC does not seek review of the Fourth Circuit's ultimate conclusion that but for WSSC's negligence, Westfarm's land would never have been contaminated by chemicals leaking out of WSSC's sewer. (Pet. 36a.) Nor does WSSC challenge the court of appeals' findings on which that conclusion rested:

(a) WSSC negligently maintained its sewer,

(b) WSSC's negligence caused toxic chemicals to leak out of its unrepaired sewer and caused contamination of Westfarm's property, and

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[1] "Pet." references are to the Petition for a Writ of Certiorari in this case.

(c) WSSC had no affirmative defense to liability under CERCLA because it failed to prove it exercised due care in maintaining its sewer.

(*Id.* at 20a-24a, 36a.)

In its Petition, WSSC glosses over its now conceded negligence, even though it is central—and fatal—to its claims here that it has no liability under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "the Act"), as amended, 42 U.S.C. §§ 9601, *et seq.* We are therefore compelled to set out briefly below the undisputed record evidence of negligence relied on by the Fourth Circuit which WSSC would have this Court ignore.

1. WSSC Learns In 1974 That Toxic Chemicals Were Routinely Dumped In Its Sewer, But Does Nothing About It

From 1974 to 1992, IFI's laboratory next to Westfarm's property annually analyzed hundreds of samples of PCE,[2] a toxic solvent listed as a hazardous substance under CERCLA (40 C.F.R. § 302.4). (Pet. 3a.) Every year during this period, IFI poured at least three gallons of PCE down a sink drain into the connected sewer line. (*Id.*) Although WSSC knew as early as June 1974 that IFI was routinely disposing of small amounts of toxic chemicals into the sewer system, WSSC took no steps to prevent further dumping. (*Id.* at 7a, 23a-24a.)[3]

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[2] "PCE" stands for perchloroethylene, a substance also known as tetrochloroethylene. (Pet. 2a.)

[3] WSSC says that IFI "lied" to WSSC about the disposal of PCE into the sewer. (Pet. 7.) WSSC so argued below, but the jury and the court of appeals, in determinations WSSC does not contest here, concluded otherwise when they found WSSC liable for its own negligence.

2. WSSC's 1977 Inspection Of Its Sewer Reveals The Need For Repairs; WSSC Again Takes No Action

The PCE that IFI poured down the drain entered a sewer lateral connecting IFI's laboratory with WSSC's main sewer line (the "Tech Road sewer"), which runs beside Westfarm's property. (Pet. 3a-4a.) In 1977, WSSC surveyed the Tech Road sewer segment closest to IFI, and found that ten internal grouting repairs were needed. (*Id.* at 5a-6a.) There is no evidence that the repairs were ever made. (*Id.* at 6a.)

In 1993, a video camera inspection of WSSC's Tech Road sewer was conducted,

> revealing numerous flaws along the length of the line, including open joints, improper alignment resulting in sags in the line and offset joints, cracks, broken pipes, improperly installed gaskets and improper manhole construction.

(Pet. 5a.)

3. Toxic Chemicals Leaking Out Of WSSC's Sewer Contaminate Westfarm's Land; The District Court And The Jury Award Westfarm Damages Caused By WSSC's Negligence

The foregoing facts surfaced after a prospective buyer of the Westfarm parcel terminated the purchase contract when an environmental audit revealed the presence of PCE in the ground water beneath the property. (Pet. 3a.)[4] Westfarm thereafter sued WSSC under CERCLA to re-

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[4] The water and sediment samples taken within the Tech Road sewer contained "elevated levels of PCE, including the highest level found in any sample at the site—110,000 parts per billion (ppb) PCE in the sediment at WSSC's manhole." (Pet. 5a.) By way of comparison, "the maximum contaminant level for PCE in drinking water, as established by the Environmental Protection Agency, is 5 ppb." (*Id.* at 5a n.2.) The PCE concentration in the ground water beneath IFI's and Westfarm's properties "ranged from several hundred ppb to approximately 7000 ppb." (*Id.*)

cover the cleanup costs, and under Maryland common law to recoup the economic losses, occasioned by WSSC's negligence. (*Id.* at 2a.) Westfarm successfully moved for summary judgment on its CERCLA claims, and the district court awarded it $140,930 in recoverable cleanup costs. (*Id.* at 8a-9a.) Westfarm also won a $2.5 million jury verdict on its common law claims for WSSC's negligent construction, maintenance and operation of its sewer. (*Id.* at 8a-9a, 32a.)[5]

4. The Court Of Appeals Affirms The Summary Judgment And Verdict

WSSC appealed the verdict and summary judgment to the Fourth Circuit "on a variety of grounds, including, most prominently, public policy arguments for exempting sewer operators from liability for damage caused by wastes dumped in the sewers by third parties." (Pet. 2a-3a.) The court of appeals affirmed in all respects. (*Id.* at 3a.) The court first found that under CERCLA, WSSC was an "owner" or "operator" of a "facility" (its sewer pipes), that PCE leakage out of that facility was a CERCLA "release," and that the leak caused contamination of Westfarm's land. (*Id.* at 13a-17a, 20a, 22a.)

The Fourth Circuit then rejected WSSC's claim that summary judgment should not have been entered against it because WSSC had a viable CERCLA "innocent landowner" affirmative defense. (Pet. 22a-24a.)[6] That sum-

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[5] IFI was a co-defendant of WSSC in this action, and had the same summary judgment and verdict entered against it. IFI has filed a brief in opposition to the petition for certiorari.

[6] CERCLA contains an "innocent landowner" or "third party" affirmative defense. *See* 42 U.S.C. § 9607(b)(3); *see also* Pet. 22a-23a. The "due care" element of this defense requires the defendant to prove that it "exercised due care with respect to the hazardous substance concerned," and "took precautions against foreseeable acts or omissions of any * * * third party." *Id.*

mary judgment rested on the following "undisputed evidence":

> WSSC knew from inspecting IFI's facility that IFI used PCE and knew that IFI poured hazardous substances into the sewer. In fact, WSSC regulations permitted discharges of certain quantities of toxic organics and other hazardous substances. WSSC was also aware that cracks were present in its sewer. Yet WSSC took no precautions—such as mending the pipes or banning the discharge of toxic organics—against the foreseeable result that hazardous substances such as PCE would be discharged into the sewer.

(*Id.* at 23a-24a.) Accordingly, WSSC could not escape summary judgment by relying on CERCLA's "innocent landowner" defense to liability, as "CERCLA does not sanction 'willful or negligent blindness.'" (*Id.*, quoting *United States v. Monsanto Co.*, 858 F.2d 160, 169 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989).) WSSC "had the power to abate the foreseeable release of PCE, yet failed to exercise that power." (Pet. 24a.) In light of that failure, the Fourth Circuit could not

> find that any genuine dispute was created that WSSC exercised due care or took precautions against the foreseeable acts of third parties such as would have entitled it to the "innocent landowner" defense.

(*Id.*) And, as regards the jury verdict, "sufficient evidence existed for a reasonable jury to determine, as it did, that WSSC's negligence was a proximate cause of Westfarm's injury." (*Id.* at 36a.)

REASONS WHY THE PETITION SHOULD BE DENIED

I. THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS

WSSC says that a "split of authority" exists as to whether CERCLA liability should be limited to the initial "releasor" of the hazardous substance (here, IFI, which put the PCE into WSSC's sewer), or also include those whose negligence allows the toxic substance subsequently to leak into the groundwater (here, WSSC, whose failure to repair its sewer caused PCE to contaminate Westfarm's land). (Pet. 12-14.) No such conflict exists. As the Fourth Circuit emphasized, all circuit courts which "have considered the question agree that CERCLA imposes liability for multiple releases." (*Id.* at 19a, citing *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d 1146, 1151 (1st Cir. 1989); *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1573 (5th Cir. 1988); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1045 (2d Cir. 1985)); *see also Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 844-46 (4th Cir.), *cert. denied*, 506 U.S. 940 (1992); *Lincoln Properties, Ltd. v. Higgins*, 823 F. Supp. 1528, 1536-39 (E.D. Cal. 1992).

WSSC argues that each of these appellate decisions is "factually distinguishable" from the present case. (Pet. 15.) Two points are in order. First, WSSC's "factual distinctions" do not advance its argument, if only because this Court does not sit to resolve conflicts among the courts of appeals created solely by differing fact patterns. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 392-93 (1923); *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951). Second, as regards the legal issue of "multiple releases" WSSC says its Petition presents, the courts of appeals have all rejected the argument

WSSC makes here. WSSC itself concedes as much. (Pet. 14-15.)[7]

Unable to base its Petition on an intercircuit conflict, WSSC is reduced to claiming that allegedly inconsistent district court decisions warrant issuance of the Writ. (Pet. 12-14.) We show in Part II below that *Lincoln Properties*, the only case WSSC cites (Pet. 9) as directly "conflicting" with the courts of appeals' uniform "multiple release" analysis, in fact adopts it. For present purposes, it is sufficient to note that even the purported district court inconsistently does not exist,[8] and if it did, it would afford no basis for granting the Petition. *See* Rule 10 of this Court.

In the penultimate paragraph of its Petition (at 16), WSSC absurdly suggests that a concrete sewer pipe falls under CERCLA's definition of "environment," as "surface water, ground water * * * or subsurface strata," 42 U.S.C. § 9601(8), because ground water can naturally seep *into*

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[7] In any event, as the Fourth Circuit recognized, the unanimous holdings of these courts of appeals that CERCLA imposes liability for multiple releases did not rest on the purported "fact differences" WSSC recites. *See* Pet. 18a-19a. If anything, these differing fact patterns only serve to confirm the sweep, across a range of facts, of the uniform legal principle for which these cases stand.

[8] Thus, *Brookfield-North Riverside Water Commission v. Martin Oil Marketing, Ltd.*, No. 90 C 5884, 1992 WL 63274 (N.D. Ill. Mar. 12, 1992), did not address whether a leak *from* a pipe (like the PCE leak from WSSC's sewer) was a "release," but only whether a leak *into* a pipe was, and even then did so in dicta. *Vermont v. Staco, Inc.*, 684 F. Supp. 822 (D. Vt. 1988), *rescinded, vacated and dismissed, in part, on other grounds*, 1989 WL 225428 (D. Vt. 1989), is likewise unavailing. *Staco* did not involve the question of whether only the first CERCLA "release" counts. Instead, the court simply held that it *did* count. It could hardly have done otherwise, as there was no claim against the owner of the pipes.

All of the remaining WSSC cases deal with an entirely different issue: whether persons owning property when a hazardous substance passively migrates onto it are liable under CERCLA, on the theory that such migration constitutes a "disposal" during their ownership. None of the cases considers—much less embraces—WSSC's novel "singe release" theory.

a sewer pipe. Therefore, says WSSC, the PCE leakage *out* of cracks in its pipe cannot be a CERCLA release "into" the environment, since the PCE was already "in" the environment, *i.e.*, its pipe . This contention can be disposed of in short order. WSSC did not tender this issue in its Questions Presented and did not present it below. WSSC nowhere explains why this Court should deviate from its traditional rule and reach the merits of an issue neither raised in a Question Presented (*see* this Court's Rule 14.1(a)), nor in the court of appeals. *Powell v. Nevada*, 114 S. Ct. 1280, 1284 n.* (1994) ("Because the issue was not raised, argued, or decided below, we should not settle it here."); *see also Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

Beyond that, WSSC's argument is ludicrous. To read CERCLA as equating a concrete or cast iron sewer pipe with surface or ground "water," one must either not understand the English language, or ignore CERCLA's text and purpose. WSSC cites no authority for this remarkable proposition, because it cannot: no court has ever held that an owner of a CERCLA facility from which there was a release, caused by the owner's negligence, has no CERCLA liability.[9]

If accepted, WSSC's argument would mean that no owner of a "well, pit, pond, lagoon, impoundment, ditch, landfill," or other such CERCLA "facility" in the "environment" (*see* 42 U.S.C. §§ 9601(8), 9601(9)), who (like WSSC) negligently allowed hazardous substances to leak out of such "facilities" could ever be liable under CERCLA.[10] Such a reading is squarely at odds with the

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[9] *Staco*, 684 F. Supp. 822, the only case WSSC does mention (Pet. 16), is inapposite. The opinion does not hold or suggest that a sewer pipe is part of the "environment," let alone that there cannot be a CERCLA "release" from such a pipe.

[10] WSSC argued below that its pipe was not a CERCLA "facility." Both the district court (Pet. 57a-58a) and the court of

text of the Act and its policies. *See Shore Realty*, 759 F.2d at 1045 (Act cannot be read so as to "open a huge loophole in CERCLA's coverage"); *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1204 (2d Cir. 1992) (rejecting CERCLA construction that "would free a potentially responsible party from liability, in blatant contravention of the statute's goals"). Moreover, WSSC's interpretation would give sewer owners the very CERCLA immunity Congress denied them, both when it passed the statute in 1980, and when it subsequently refused so to amend the Act. *See infra* pp. 16-17 & n.16.

II. THIS CASE DOES NOT PRESENT ANY QUESTION OF "NATIONAL IMPORTANCE"; EVEN IF IT DID, THAT QUESTION IS FOR CONGRESS TO ANSWER

According to WSSC, the decision below is of "national importance" because, unless reversed, it will require "victimized" and "passive" sewer operators to maintain leakproof sewers, "entirely control" the actions of their customers, and "insure" that "all" hazardous waste remains within the pipe. (Pet. i, 8-11, 17.) There are two dispositive answers to WSSC's hysteria. First, as shown above, WSSC was neither a "victim" nor "passive," but a sewer operator which "*actively*"—through its conceded negligence—allowed the PCE to leak *out of* the unrepaired cracks it *knew* were in its sewer:

> Although once WSSC built its sewer system, it apparently did become quite "passive" in its actions regarding operation and maintenance of the sewer, this passivity was negligent in and of itself because WSSC knew that the sewer contained cracks and should have known that the sewer needed maintenance.

(*Id.* at 36a.)

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appeals (*id.* at 13a-15a) rejected this contention. WSSC wisely does not resurrect it in this Court.

Second, the Fourth Circuit decision does not set an impossible standard for sewer operators to meet. Rather, all the court of appeals requires of sewer operators is that they satisfy the elements of CERCLA's innocent landowner defense (42 U.S.C. § 9607(b)(3)), by exercising "due care" in maintaining their systems, and taking reasonable "precautions against foreseeable acts" of their customers. (Pet. 23a-24a.) A sewer operator not guilty of negligence has nothing to fear from the Fourth Circuit's opinion:

> WSSC argues that because Westfarm admitted that all sewers leak—because water can pass through a solid wall of concrete to a small extent—all sewer operators will be held liable. *The duty to exercise reasonable care, however, does not require a leak-proof sewer system, only a sewer which does not leak unreasonably due to being constructed, maintained, and operated without due care.* Moreover, the scope of the duty reasonably to prevent leaks will vary with the reasonable expectation of what materials foreseeably might find their way into the sewer; the reasonable construction, maintenance, and repair of a sewer carrying only "toilet, sink, shower and bath" household waste might differ from the reasonable construction, maintenance, and repair of a sewer carrying dangerous industrial chemicals.

(*Id.* at 33a-34a (emphasis added).) Accordingly,

> WSSC's policy argument that CERCLA liability in the instant case will force sewer operators to fear liability from "every toilet, sink, shower and bath," falls flat. If domestic users of sewers do not foreseeably release hazardous materials into the sewer system, the [CERCLA] third party defense will allow WSSC to avoid liability for an unforeseeable dumping of hazardous substances into domestic plumbing.

(*Id.* at 24a.)[11]

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[11] WSSC's argument also overlooks the fact that even if sewer operators are found liable under CERCLA, the Act allows them

If any further proof were needed that a sewer operator, who—unlike WSSC—acts with reasonable care, has no exposure under CERCLA, *Lincoln Properties*, the very case WSSC relies upon (Pet. 9), provides it. In *Lincoln Properties*, the county sewer authority exercised due care in maintaining its sewer and took reasonable precautions against its customers' foreseeable toxic discharges. 823 F. Supp. at 1543-44. Because the sewer authority "established by uncontroverted evidence" all elements of the innocent landowner defense, it had no CERCLA liability for the PCE contamination. *Id.* at 1544.[12] Therefore, only those operators like WSSC, who concededly fail to exercise ordinary care in maintaining their sewers, are subject to CERCLA liability under the court of appeals' rationale, just as public sewer operators have been traditionally liable for such negligence at common law. *See* Pet. 26a-27a (collecting Maryland cases).[13]

Given the black letter negligence principles (rooted in the common law and embodied in CERCLA's innocent landowner defense) on which the decision below turns, it is no wonder that the "considerable discussion" in the

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to petition the court to apportion the cleanup costs to reflect the defendants' relative responsibility for the contamination. *See* 42 U.S.C. § 9613(f)(1).

[12] The *Lincoln Properties* court so held, even though there was substantial PCE contamination, which the court assumed for purposes of its decision resulted from leaks in the sewer authority's wells and pipes. *Id.* at 1533, 1538-39. So much for WSSC's melodramatic claim (Pet. 8-9) that under the court of appeals' decision here, a non-negligent sewer operator would be responsible under CERCLA for cleanup costs if it did not "insure" that "all" hazardous waste remained within the pipe, but instead allowed "a single molecule" of waste to escape.

[13] Of course, even if the duties to exercise due care and avoid negligent maintenance of a sewer could properly be characterized as "burdens" (Pet. 8-9), such "burdensome consequences are not sufficient grounds to judicially graft an exemption onto a statute, a graft that would thwart the language, purpose, and agency interpretation" of CERCLA. *B.F. Goodrich*, 958 F.2d at 1206.

"environmental arena" (Pet. 9) WSSC says has been generated by this case consists only of two law review Notes.[14] One of these Notes claims that the decision in this case conflicts with the district court decision in *Lincoln Properties*, 823 F. Supp. 1528. Frye, *supra* note 14. This contention is specious. *Lincoln Properties* rejected the "single release" theory WSSC advocates, in favor of the "multiple release" analysis followed by all the courts of appeals. 823 F. Supp. at 1536-37. Indeed, the Fourth Circuit cited *Lincoln Properties* for this very reason. *See* Pet. 19a. The sewer authority prevailed in *Lincoln Properties*, not on the basis of a "single release" argument, but because on the facts there presented, the sewer authority was entitled to rely on CERCLA's innocent landowner defense. 823 F. Supp. at 1543-44.

As the better-reasoned of these two law student analyses points out, *Lincoln Properties* and *Westfarm* both applied the same legal analysis of public sewer system liability under CERCLA to dramatically different facts. 22 B.C. Envtl. Aff. L. Rev. at 115, 127. Thus, *Westfarm* "is an example of an instance in which a public sewer system authority failed to take the ordinary steps necessary to defend itself against CERCLA liability." *Id.* at 127. Specifically, WSSC

> designed its sewer system to leak and failed to upkeep its sewer lines properly even when it was on notice that portions of its sewer line needed repair. Although the WSSC possessed an ordinance that regulated discharges into the sewer system, the court found that the ordinance provided insufficient protec-

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[14] Peter R. Hinckley, *State and Municipal Sewer System Authority Liability Under CERCLA: Who Should Pay for the Cleanup of Hazardous Industrial and Commercial Sewer Discharges?*, 22 B.C. Envtl. Aff. L. Rev. 89 (1994); Robert M. Frye, *Municipal Sewer Authority Liability Under CERCLA: Should Taxpayers Be Liable for Superfund Cleanup Costs? Westfarm Associates Limited Partnership v. International Fabricare Institute*, 14 Stan. Envtl. L.J. 61 (1995).

> tion against hazardous discharges. Finally, a WSSC representative admitted that the WSSC foresaw that some of its industrial customers would release hazardous substances into the sewer system. * * * Because the WSSC's conduct proximately caused the PCE contamination, the WSSC failed to satisfy the "caused solely by" requirement of CERCLA's third party affirmative defense.

Id. at 116 (footnotes omitted). In *Lincoln Properties,* on the other hand, the County

> *exercised due care and took reasonable precautions against the foreseeable acts and omissions of its commercial customers.* The County built and maintained sewer lines in accordance with industry standards and promulgated an ordinance that prohibited the discharge of PCE and other cleaning solvents into the sewer system. The County also could not be expected to foresee that its ordinance prohibiting the discharge of hazardous substances would be violated. Under such circumstances, the County's conduct was indirect and insubstantial to the release of PCE and the County thus met the "caused solely by" third parties requirement.

Id. at 115-16 (emphasis added) (footnotes omitted).

In sum, WSSC's "questions" of "national importance" are not raised by the decision below, and have not triggered a conflict among the circuits, or even resulted in inconsistency in the district courts. That is not surprising, as WSSC's true quarrel is with CERCLA and the Congressional purposes it furthers. WSSC does not want to be covered by CERCLA, nor to have to act with the reasonable care the Act requires of sewer operators. Unfortunately for WSSC, CERCLA on its face applies to public sewer operators like WSSC, and subjects them to the same strict liability, tempered by the innocent landowner defense, imposed on all "operators" of "facilities."

When the Fourth Circuit found WSSC liable for CERCLA cleanup costs caused by its negligence, it simply

obeyed the plain command of the Act, and thereby advanced CERCLA's overriding goal of "impos[ing] the costs of the cleanup on those responsible for the contamination." *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7 (1989).[15] WSSC's "failure to maintain its pipes in good condition earned it some responsibility for the contamination." (Pet. 19a.) Treating PCE leaking out of WSSC's negligently maintained sewers as a "release" therefore does no violence to CERCLA's policy; instead, it vindicates it. (*Id.* at 19a-20a.)

As the Fourth Circuit held, in the final analysis the ultimate question WSSC raises—whether leaks caused by public sewer operators' negligence are covered by CERCLA—is "for the Congress * * * to decide." (Pet. 41a.) Indeed, the question has already been answered by the legislative branch:

> We sit as a court, not a super-legislature. While the public policy arguments raised by WSSC may be meritorious, we can only presume that those arguments were weighed and rejected by Congress when it enacted CERCLA without including a broad exemption for state and local governments or their [publicly owned treatment works].

(*Id.* at 17a.) *See Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980) ("Whatever their validity, the contentions now pressed on us should be addressed to the political branches of the Government, the Congress and the Executive, and not to the courts."); *see also Neal v. United States*, 64 U.S.L.W. 4077, 4080 (U.S. Jan. 22, 1996). This Court's observation in *Diamond* applies with particular force here, in light of Congress' post-enactment refusal to pass legislation containing the very protections WSSC asks this Court to read into the statute. *See* 22 B.C. Envtl. Aff. L. Rev. at 102-04, 126 (summarizing

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[15] Subsidiary CERCLA policy considerations likewise support the result reached below. *See* Pet. 16a-17a; *B.F. Goodrich*, 958 F.2d at 1204; 22 B.C. Envtl. Aff. L. Rev. at 121-22.

unsuccessful attempts in 1991 and 1993 to amend the Act so as to exempt public sewer systems from CERCLA liability).[16]

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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[16] Similar efforts in 1995 met the same fate. *See* H.R. 854, 104th Cong., 1st Sess. (1995) (bill to eliminate sewer owner CERCLA liability for transportation of municipal solid waste); H.R. 855, 104th Cong., 1st Sess. (1995) (proposed amendment of CERCLA to cap liability for cleanup of municipal solid waste).